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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re M.F., a Person Coming Under the
Juvenile Court Law.

B207657

(Los Angeles County
Super. Ct. No. CK49405)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.G., et al.,

Defendants and Appellants;

J.F., et al.,

Appellants;

M.F.,

Respondent.

APPEAL from an order of the Superior Court of Los Angeles County. Steven Berman, Juvenile Court Referee. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant L.G.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant M.F.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Appellant J.F.

Aida Aslanian, under appointment by the Court of Appeal, for Appellants A.C. and A.A.

Roni Keller, under appointment by the Court of Appeal, for Respondent M.F.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Byron G. Shibata, Deputy County Counsel, for Plaintiff and Respondent.

This appeal is from an order terminating parental rights under Welfare and Institutions Code section 366.26¹ over minor M.F. Appellants L.G. (mother), M.F. (father), and siblings J.F., A.C., and A.A.² contend the evidence was insufficient to support the juvenile court's finding that the "sibling exception" to terminating parental rights under section 366.26 subdivision (c)(1)(B)(v) did not apply. Appellants further contend that postjudgment events concerning M.F.'s prospective adoption provide a basis for reversing the order terminating parental rights. We affirm the judgment.

BACKGROUND

Mother and father are the parents of M.F., born in July 2002, and his brother, J.F., born in March 2001. Mother is also the parent of A.C., born in April 1996, and A.A., born in May 1998.

1. July 2, 2002 and August 7, 2002 Petitions

On July 2, 2002, the Department of Children and Family Services (DCFS) filed a petition under section 300 alleging that mother had physically abused her sons, A.C. and

¹ All further statutory references are to the Welfare and Institutions Code.

² Mother, father, J.F., A.C. and A.A. are referred to collectively as appellants.

A.A., by striking them with her hand, a cord, and a belt, causing A.C. to sustain bruises and marks on his face, forehead, back, and arm. The petition further alleged that mother had locked A.C. in the bathroom for one hour. At the detention hearing, the juvenile court found a prima facie case for detaining A.C., A.A., and their brother, J.F., as persons described under section 300, subdivisions (a), (b), (g), and (j), and ordered the three children detained. The juvenile court found father to be the alleged father of J.F., EST.C. to be the alleged father of A.C., and ALF.A. to be the alleged father of A.A. None of the alleged fathers had been located at the time of the detention hearing.³

On August 7, 2002, shortly after M.F. was born, DCFS filed a petition on his behalf alleging that mother's inappropriate physical discipline of A.C. and A.A. put M.F. at risk of similar abuse. M.F.'s detention report stated that all four siblings had been placed together in the same foster home. DCFS also reported that it had located and interviewed father, who had traveled from Mexico to the United States on an undocumented basis and was intermittently living in both countries. In August 2002, father was living with mother in California. He admitted to not providing mother with any material assistance

At the detention hearing for M.F.'s petition, the juvenile court found a prima facie case for detaining M.F. under section 300, subdivisions (a) and (b) and ordered him placed in the same foster home as his three siblings. The court also found father to be M.F.'s presumed father, and ordered family reunification services for both father and mother. The court ordered DCFS to evaluate the home of a paternal aunt and uncle as a possible placement alternative for M.F.

On August 16, 2002, DCFS filed a first amended petition alleging that mother used inappropriate physical discipline on A.C., A.A. and J.F., and that father used inappropriate physical discipline on A.C. and A.A. In its August 2002 jurisdiction/disposition report, DCFS reported that all four siblings were placed together. The foster mother reported that M.F.'s siblings were very excited to have him join them

³ Neither EST.C. nor ALF.A. could be located throughout the juvenile court proceedings below and neither is a party to this appeal.

and that the children appeared to be “very united.” The foster mother further reported that A.C., the eldest of the siblings, took care of the other the children and disciplined them as well. Mother and father were receiving reunification services and participating in monitored visits with the four children.

In an August 28, 2002 interim review report, DCFS recommended that every effort be made to keep the four children together as a sibling group. DCFS explained that because the older children had only recently met M.F., it would not be beneficial, particularly for A.C. and A.A., to separate the siblings. At a September 24, 2002 hearing, the juvenile court found that DCFS had not abused its discretion by keeping M.F. with his siblings instead of placing him with the paternal aunt and uncle.

On November 20, 2002, the juvenile court modified the first amended petition by interlineation and sustained the petition as amended. The court found the children to be persons described under section 300, subdivisions (a), (b), and (g).

In December 2002, DCFS reported that mother and father were participating in a program of counseling, including parenting education, individual counseling to address physical abuse, and domestic violence counseling. At a December 12, 2002 hearing, the juvenile court ordered unmonitored visits of up to four hours, three times a week.

At the time of the February 2003 interim review hearing, M.F. and his siblings were placed together in the home of a new foster mother. The older children were participating in therapy. Mother and father were participating in parenting and domestic violence programs and visited regularly with the children.

At the February 12, 2003 disposition hearing, the juvenile court declared the four children to be dependents of the court and ordered them suitably placed. The court ordered family reunification services for mother and father, including weekday and overnight weekend visits.

2. Six-Month Review Proceedings

After six months of reunification services, the children remained placed together in the same foster home. The DCFS social worker discussed with A.C. the possibility of returning home to mother and father, and A.C. stated he was fine with that, but reported

that father did not speak to him during visits. When the social worker discussed with A.A. the possibility of going home, he became upset and said he did not want to go home. J.F. was experiencing behavioral problems, including temper tantrums, but was improving. A.C. and A.A. were continuing with weekly individual therapy sessions. M.F. was “doing very well” in the foster home placement.

In an interim review report dated April 28, 2003, DCFS reported that there had been nine weekend visits between the children and the parents. The foster mother had expressed concerns when A.C. and J.F. returned from the visits with bruises, and the social worker observed minor bruises on A.C.’s and J.F.’s faces. When asked about the children’s injuries, mother denied hitting the children, and A.C. denied that mother hit him or his siblings. Because DCFS was unable to confirm any abuse, the children’s bruises were determined to be accidental. Both the parents and the children reported enjoying visiting with one another, and A.C. told the social worker that he did not want to return to placement because he wanted to remain with mother. At a hearing on April 28, 2003, the juvenile court ordered the children released to mother and father on the condition that the parents follow their case plan.

At a June 11, 2003 hearing, DCFS reported that the children were doing well in the care of their parents. The juvenile court terminated its previous placement order and issued a home of parent order for the children.

3. October 15, 2003 Section 342 Petition

On October 15, 2003, DCFS filed a petition under section 342, alleging serious physical harm, failure to protect, severe physical abuse of a child under five, cruelty, and abuse of a sibling (§ 300, subds. (a), (b), (e), (i), (j).) The petition alleged that on October 9, 2003, M.F. had sustained a fracture to his right femur and left humerus, and that the injuries appeared to be nonaccidental. Mother, who was the only person alone with M.F. at the time of injury, told the social worker that the child had fallen while trying to pull himself up to a stroller.

At the October 15, 2003 detention hearing, the juvenile court ordered the children detained and granted mother and father monitored visits. The court appointed Carol

Berkowitz, M.D., to evaluate the medical issues. Dr. Berkowitz reported in a letter dated November 26, 2003, that the fracture to M.F.'s right femur was consistent with a yanking motion, not a fall, and was therefore an inflicted injury. At the January 27, 2004 adjudication hearing, the parties stipulated to strike the allegation of cruelty under section 300, subd. (i), and the juvenile court sustained the petition as amended.

In March 2004, DCFS reported that M.F. and his siblings were placed in two separate foster homes. Both parents, A.C., and A.A. were participating in individual and conjoint counseling. In April 2004, DCFS reported that both A.C. and A.A. had expressed a desire to return home, and that both mother and father wanted the children returned home. Mother and father had diligently and consistently participated in parenting and counseling programs and had attended weekly monitored visits with all four children at the foster family agency. DCFS recommended that the children be returned home, under DCFS supervision and with family maintenance services. On April 7, 2004, the juvenile court declared the children dependents of the court pursuant to section 364, released the children to the parents, and ordered family maintenance services and conjoint counseling.

At the October 6, 2004 review hearing, DCFS reported that the four children were receiving appropriate care and supervision in their parents' home, that the parents were continuing with all court-ordered programs, and that the parents were nurturing and providing the children with love and attention. Based on DCFS's recommendation, the juvenile court terminated jurisdiction, but stayed the order pending receipt of a family law order on custody and visitation.

4. October 13, 2004 Section 342 Petition

One week later, DCFS filed a second section 342 petition, alleging that M.F. had been hospitalized on October 7, 2004, with severe brain trauma. The child was suffering from an acute subdural hematoma and retinal hemorrhaging to the right eye, requiring immediate surgery. He was also comatose and reliant on a ventilator. The petition alleged that all four children came within the provisions of section 300, subdivisions (a), (b), (e), (i), and (j).

DCFS's detention report stated that A.C., A.A., and J.F. were placed together in foster care while M.F. remained hospitalized. An attached Los Angeles Police Department report indicated that mother and father had given several differing and inconsistent explanations for M.F.'s injuries.

On October 13, 2004, the juvenile court vacated its previous order terminating jurisdiction, found a prima facie case for detaining the children, and ordered M.F.'s siblings detained in shelter care. The court ordered an evaluation of M.F.'s medical records under Evidence Code section 730 and scheduled a status review hearing for November 15, 2004.

In November 2004, DCFS reported that M.F. had been transferred from the UCI Medical Center to Long Beach Memorial Medical Center. Although he had initially not been expected to survive, M.F. had improved and was more alert and responsive. He had received intensive rehabilitation services, including physical therapy, speech therapy, and recreational therapy, and was now able to move his right hand and leg. He was still experiencing some paralysis, however, on his left side.

M.F.'s siblings had been placed together with a new foster mother. At a November 15, 2004 hearing, the juvenile court set a contested adjudication hearing for January 18, 2005, and ordered weekly monitored visits for the parents, three hours per week.

In a letter dated December 13, 2004, Dr. Berkowitz reviewed M.F.'s medical records for the court. Dr. Berkowitz stated that M.F.'s hematoma was accompanied by a depression of the brain stem into the spinal canal, that he had been comatose, and his injuries required surgery to remove the blood that was compressing his brain. Without surgical intervention, M.F. would have died. Despite the intervention, he suffered irreparable brain damage. Dr. Berkowitz opined that M.F.'s injuries were "most consistent with a severe blow to the head or a severe episode of shaking." After his emergency surgery, M.F. underwent a tracheostomy to facilitate breathing, and had a gastrostomy tube placed for adequate nutrition. He remained hospitalized for one month and was discharged on November 9, 2004.

At a hearing on January 20, 2005, and January 28, 2005, the juvenile court heard testimony from A.C., A.A., and mother. The court then sustained an amended section 342 petition and ordered the children suitably placed. The court terminated its previous orders and denied family reunification services to father and mother.

5. Section 366.26 Proceedings

In May 2005, DCFS reported that M.F.'s tracheotomy and gastrostomy tubes had been removed. He had undergone further surgery to insert a plate to replace a part of his cranium that had been removed during his initial emergency surgery. He no longer needed to wear a protective helmet, was beginning to use his left arm more, and was using more speech, although he still had difficulty forming sentences.

During M.F.'s hospitalization, his siblings visited once. The DCFS social worker monitoring the visit observed that M.F. was a "little hesitant" at first, but eventually became more comfortable. The children all interacted well and played with M.F.'s toys. Both parents participated in weekly monitored visits with M.F. from January 2005 through May 2005.

M.F. was discharged from the hospital on April 26, 2005, and placed with foster mother J.C. DCFS reported that by four weeks after his placement, M.F. had become familiar with the other foster child in the home and had begun to adapt to the routine in the new home. M.F. appeared to be happy and smiled and laughed while with J.C.

M.F.'s siblings were still placed together in a separate foster home. Mother and father visited separately with M.F.'s siblings every Saturday at a Carl's Jr. restaurant. DCFS informed J.C. of these visits and encouraged her to attend with M.F. Because J.C.'s work schedule often included weekends, DCFS recommended that a plan be developed to include M.F. in the weekly visits with his siblings.

At a June 22, 2005 progress hearing, the juvenile court ordered DCFS to prepare a supplemental report addressing the issues of home studies and adoption. The court acknowledged that it had issued a previous order to place the children together, but noted that M.F. had different medical needs that would have to be considered in placement.

In a July 28, 2005 status report, DCFS reported that M.F. was well adjusted to his foster placement with J.C. and the other child over whom she had legal guardianship. J.C. expressed an interest in becoming M.F.'s legal guardian. M.F. was in stable health, but doctors recommended that he continue to sleep in a crib because of his medical condition. He was not receiving any counseling or therapy because he had not demonstrated any emotional or behavioral problems, although he was scheduled to receive a psychological evaluation. The DCFS social worker observed that M.F. laughed and smiled as he played with others. He appeared excited when seeing people with whom he had established a relationship. When he saw his parents, hospital staff, and other people that he recognized, he began to smile, laugh, and shake his body and hands with excitement.

By July 2005, a visitation plan had been developed and implemented, and all four children had monitored visits with mother and father every other week at a Carl's Jr. restaurant. In addition, M.F. had monitored visits with mother and father only. J.C. reported that M.F. interacted positively with both his parents and siblings during the visits. J.C. also noted that J.F. appeared to be closer to M.F. than the other siblings and would interact more with him during the visits. On July 13, 2005, J.C. held a birthday party for M.F. attended by M.F.'s parents, siblings, and cousins.

At a July 28, 2005 progress hearing, the juvenile court ordered permanent placement services and another progress report, and continued the section 366.26 hearing to August 2005. In an addendum report dated August 23, 2005, DCFS recommended adoption for M.F. and his siblings together, while acknowledging that finding an adoptive placement for all four children together might not be possible. J.C. said she would consider adopting M.F. if other prospective placements failed.

In January 2006, DCFS reported that M.F. had adjusted well to his placement with J.C., who was able to meet his needs. The two had bonded and there was an obvious attachment between them. M.F. was meeting quarterly with therapists from the Harbor Regional Center. He received daily physical and speech therapy, as well as elementary schooling, but no mental health therapy. He enjoyed the company of others and playing

with other children. The social worker observed M.F. smiling and laughing as he played with his siblings. The DCFS social worker advised J.C. that a potential adoptive placement for M.F. had fallen through and asked her whether she would be willing to adopt M.F. or become his legal guardian. J.C. expressed interest, but was concerned that her busy schedule and her care of other medically fragile foster children in her home might prevent her from being able to commit to M.F. as needed. She told the social worker “I love [M.F.], I just need more time.”

In a separate status review report for M.F.’s siblings, DCFS reported that the three children were appropriately placed in foster care. The children continued their visits with M.F., twice a month for one hour, as well as their visits with mother and father.

At a January 26, 2006 progress hearing, the juvenile court found A.C., A.A., and J.F. to be a sibling group. M.F.’s counsel requested that M.F. be included in the sibling group as well, but the court declined because M.F.’s medical needs required a different placement from the other children. The court found all four children difficult to place under section 366.26, subdivision (c)(3), but ultimately adoptable.

In a July 2006 status review report, DCFS stated that M.F. was still appropriately placed with J.C. and was continuing physical therapy and speech therapy at school. He required new orthopedic braces for his feet, but was not demonstrating any emotional or behavioral issues. The DCFS social worker reported that M.F. appeared to be “a happy 4-year-old boy who likes to play with other children and enjoys the company of others.” M.F. continued to participate in combined visits with his siblings and parents, every other week at a Carl’s Jr. restaurant. J.C. reported that the sibling visits went well and again observed that J.F. appeared closer to M.F. and interacted with him more. J.C. advised the social worker that she wanted to become M.F.’s legal guardian and would consider possible adoption in the future. She said she was currently adopting another child and when she was done with that process she would be ready to adopt M.F.

In a separate status review report for M.F.’s siblings, DCFS reported that the three children appeared to be “extremely happy” in their continued foster placement. The children were developing well intellectually, socially, and with no physical handicaps.

A.C. and A.A. continued to progress in individual therapy, and J.F. had begun individual therapy and speech therapy.

In November 2006, DCFS reported that the older children's foster mother stated that neither parent had visited the children since September 22, 2006. During her last visit, mother had informed the foster mother that father was incarcerated.⁴

In a report dated November 22, 2006, the DCFS social worker observed that J.C. was a devoted and diligent caregiver, and that it was evident she and M.F. had formed a strong bond. J.C. reiterated her commitment to obtain legal guardianship over M.F. but wished to defer any decision regarding adoption until after she had completed the adoption of the other foster child in her care.

At a November 22, 2006 hearing, the juvenile court found that M.F. was not adoptable because of his medical condition, and appointed J.C. as his legal guardian. The court found M.F.'s three siblings to be adoptable and ordered a continued search for an adoptive placement as a sibling group.

In a status review report dated January 24, 2007, DCFS reported that M.F.'s siblings appeared to be extremely happy in their foster home placement. All three children were developing in an age appropriate manner and did not appear to have any visible handicaps, although J.F. had recently been evaluated with impulse control and socialization problems and was referred for psychotherapy services. All three children attended school and were able to participate in school activities. A.C. and A.A. also enjoyed playing sports. The children continued to visit with M.F. twice a month for an hour and a half per visit.

On January 24, 2007, the juvenile court received and filed letters of guardianship appointing J.C. as M.F.'s legal guardian. As part of the guardianship arrangement, the court ordered monitored visitation for both parents.

⁴ Father and mother were arrested on September 19, 2006 and September 20, 2006, respectively, for child abuse. Mother remained incarcerated throughout the remainder of the juvenile court proceedings below and is not expected to be released until 2010.

In February 2007, DCFS reported that M.F. remained appropriately placed with J.C. M.F. referred to J.C. as “mommy,” and the attachment between the two of them was “very apparent.” M.F.’s siblings remained placed with the same foster mother. All three of the siblings had been re-referred to individual therapy because they had expressed unhappiness about being unable to visit their incarcerated parents.

In May 2007, DCFS reported that M.F.’s siblings continued to be well placed in their foster home. The children were continuing with their individual therapy and were developing without significant difficulties except for J.F., who was showing some developmental delays. Father had been released from incarceration in March 2007 and resumed his visits with M.F.’s siblings that same month. The weekly monitored visits took place at a local restaurant, and the children looked forward to and enjoyed the visits.

At a May 23, 2007 hearing, counsel for A.C. and A.A. advised the juvenile court that M.F.’s siblings had not visited with him since the previous year and requested a sibling visitation order. Counsel for J.F. and M.F. joined in the request, indicating that M.F.’s legal guardian was not opposed to visits. The juvenile court ordered sibling visits at least every three weeks and gave DCFS discretion to liberalize the visitation schedule.

In August 2007, DCFS reported that M.F.’s three siblings continued to be well placed with no significant problems. The three children continued to visit with father but had had no visits with mother since her incarceration. Since May, the siblings had visited with M.F. a total of three times. Father also participated in these visits, which took place at a shopping mall for one hour. The visits were appropriate; the children ate, played, and discussed their daily activities with father. The older siblings translated between father, who spoke Spanish and M.F., who spoke English. The three siblings appeared comfortable with M.F. and looked forward to the visits.

DCFS reported that M.F. remained well placed with J.C. M.F.’s doctors recommended hip surgery in the near future to alleviate muscle spasms in his hip abductors and hip flexors. The doctors also recommended that M.F. continue to sleep in a crib because of his head trauma. J.C. stated that she was ready to adopt M.F., and DCFS undertook and completed a home study and adoption assessment.

At an August 23, 2007 review hearing, the juvenile court found that a planned permanent living arrangement with the current foster mother was the most appropriate plan for M.F.'s three siblings, and that the likely date the children would achieve their goal of emancipation was their 18th birthdays. With regard to M.F., the court ordered continued sibling visits but no parental visitation, and set a section 366.26 hearing for December 6, 2007.

In December 2007, DCFS reported that M.F. continued to be well placed with J.C., and that he had undergone successful hip surgery. At a December 6, 2007 hearing, counsel for A.C. and A.A. advised the juvenile court that sibling visits with M.F. were not occurring as regularly as had been ordered. In response, the court ordered DCFS to facilitate sibling visits at least every other week.

In February 2008, DCFS reported that M.F.'s older siblings continued to be well placed in their foster home. A.C. and A.A. said they wished to remain with their current foster mother; however, all three children said that they wanted to continue seeing their biological family, especially father and M.F. DCFS had scheduled two sibling visits to take place that month. By this time, M.F.'s adoptive home study had been approved, and DCFS reported that M.F. continued to do well in J.C.'s care.

At a February 21, 2008 review hearing, counsel for A.C. and A.A. stated that based on conversations with his clients, he believed sibling visits were not occurring as frequently as the court had ordered. In response, the juvenile court ordered sibling visitation at least once every three weeks and ordered DCFS to ensure that the visits occurred.

6. April 25, 2008 Section 366.26 Hearing

At the April 25, 2008 section 366.26 hearing, the juvenile court admitted documentary evidence, including DCFS's reports and case file, and the stipulated testimony of A.A., J.F., mother, and father. A DCFS social worker, A.C., A.A., and J.C. testified at the hearing.

A.C. testified that he did not remember much about the time that he and his two other siblings lived with M.F. in their parents' home. He said that M.F. was still a baby

at that time, and that he would sometimes feed him and play with him. A.C. said that after being removed from their parents' home, he, A.A. and J.F. used to visit with M.F. at a Carl's Jr. restaurant, but they no longer saw M.F. except at court appearances. A.C. said he believed M.F. enjoyed the visits because he smiled during the visits. M.F. recognized his siblings, called them by name, and talked with them. A.C. said that he sometimes cried a little at the end of the visits, but that M.F. did not cry because "he doesn't know." When asked how M.F. reacted when the sibling visits were over, A.C. replied, "He just said good-bye. That's it." The court precluded testimony by A.C. about how he felt during his visits with M.F. and whether he was unhappy about not being able to see M.F. more frequently.

The parties stipulated that A.A. would testify that he enjoys visits with M.F., that he loves M.F. and is opposed to M.F.'s adoption. In addition, A.A. testified that he did not think it was in M.F.'s best interest to be adopted because "he's our brother."

Alexandra Ronces testified that she was the DCFS social worker assigned to A.C., A.A., and J.F., and that she had monitored three visits between the siblings and M.F. in August 2007. She said M.F. appeared happy during the visits because he smiled, approached his siblings as if he was not afraid of them, and did not cry. At the end of the visits, the three siblings would hug M.F. and give him a kiss. On the first visit, M.F. returned the hugs. On other visits, he allowed the others to hug him, and then turned to leave. Ronces did not observe any of the children crying at the end of visits, and M.F. did not appear to be upset when the visits ended. She said that A.C. appeared to be the most bonded with M.F. because he interacted with M.F. the most during the visits.

J.C. testified that if she adopted M.F., she would be inclined to discontinue sibling visits for the present, but would support M.F.'s future decisions on the matter when he became "old enough." When asked what age would that would be, J.C. responded that she did not know. J.C. explained that she would discontinue the sibling visits because she thought M.F. would be confused by the contact with his siblings. She said that after past visits, M.F. exhibited language and behavior that was "out of his character." She also stated that she observed no sibling bond between M.F. and his siblings. She saw no

difference between M.F.'s interaction with his friends at school and his interaction with his siblings. J.C. compared M.F.'s sibling interactions with those between M.F. and her daughter. She said that M.F. looks for her daughter, asks for her by name, and waits for her when she returns from school. In contrast, M.F. never asked to see his siblings or to speak to them by telephone. J.C. said that she reminds M.F. every day that he has siblings and would allow the siblings to send photographs of themselves to him.

The parties stipulated that J.F., if called to testify, would state that he opposed M.F.'s adoption. J.F. would also testify that during visits with M.F., M.F. would greet him and the two would play together. When the visits ended, J.F. would hug M.F. goodbye.

The parties stipulated that mother would testify that she did not want M.F. to be adopted, that she did not want her parental rights terminated, and that even though she would be incarcerated until 2010, she believed she had a relationship with M.F. that she wished to preserve.

The parties stipulated that father would testify that he did not want M.F. adopted, that the four siblings should remain in contact with each other, and that it would be especially harmful to M.F. to cut off contact with his brothers, and that he opposed the termination of his parental rights for these reasons.

At the conclusion of the hearing, the juvenile court found that M.F. had not shared similar experiences with his siblings, that the siblings had not met their burden of showing detriment to M.F. in severing the sibling relationship, and that the benefit to M.F. in being adopted and having permanency with his caretaker outweighed any such detriment. The court accordingly found that the section 366.26, subdivision (c)(1)(B)(v) exception to terminating parental rights did not apply. The juvenile court then found that it would be detrimental for M.F. to be returned to his parents, and terminated the parental rights of mother and father. The court further found by clear and convincing evidence that M.F. was adoptable and that J.C. was his prospective adoptive parent.

The juvenile court also expressed "its own personal opinions" as to whether sibling visits should continue between M.F. and his brothers: "I think they should. I

don't think there's any harm in it. And I would certainly suggest that to the legal guardian, but I didn't see there would be any burden or any disability or any detriment to [M.F.] if that doesn't happen." When counsel for J.F. asked whether the juvenile court would issue an order for continued sibling visitation, the court replied that the decision was in the discretion of DCFS and M.F.'s legal guardian. The court stated that it would not order visitation but "strongly suggest[ed]" it. This appeal followed.

7. September 3, 2008 Hearing

After the instant appeal was filed, we granted J.F.'s request for judicial notice of a September 3, 2008 minute order concerning further proceedings before the juvenile court on that date. We also granted DCFS's motion to take additional evidence, and to augment the record on appeal to include the reporter's transcript of the juvenile court proceedings on September 3, 2008, and a document entitled "Information for Court Officer" dated September 3, 2008.

The additional evidence indicates that DCFS had had discussions with M.F.'s legal guardian, J.C., regarding the amount of assistance funds that would be available for M.F.'s care after his adoption. DCFS informed J.C. that the amount of assistance funds available after M.F.'s adoption could be \$561 less per month than the amount J.C. had been receiving while acting as M.F.'s caregiver. J.C. advised the social workers that the reduced assistance payments would not be sufficient to meet M.F.'s expenses. J.C. stated that she still wishes to adopt M.F., but that she wants his monthly assistance payments to remain unchanged. DCFS reported that for this reason, it "cannot proceed with the adoption at this time."

A post-permanent plan review hearing was held before the juvenile court on September 3, 2008. At that hearing, the juvenile court examined the adoption worker, supervisor, and J.C., and heard argument from the parties. M.F.'s counsel advised the juvenile court that M.F.'s legal guardian was "completely committed to [M.F.] and wants to adopt him. It's only problematic -- the much lower [assistance] rate makes it very challenging." At the conclusion of the hearing, the juvenile court ordered legal guardianship as the permanent plan for M.F., with the likely date for his emancipation at

his 18th birthday. The court also ordered that sibling visits be reinitiated between M.F. and his siblings every other week for three hours.

We requested supplemental briefing from the parties regarding the impact of the juvenile court's September 3, 2008 minute order on the issues presented in this appeal.

CONTENTIONS

Appellants contend that the findings and orders reflected in the juvenile court's September 3, 2008 minute order show that M.F. is no longer an adoptable child and that the order terminating parental rights should be reversed in order to prevent M.F. from becoming a legal orphan. Mother, father, and J.F. contend the evidence did not support the juvenile court's finding, at the April 25, 2008 section 366.26 hearing, that the sibling exception under section 366.26, subdivision (c)(1)(B)(v) did not apply. In addition, father, A.A. and A.C. contend that infrequent sibling visits, contrary to court orders for regular visits, prejudiced them. A.A. and A.C. contend the juvenile court erred by not considering their feelings about their relationship with M.F., and the court's ruling was contrary to the legislative intent of preserving sibling groups.⁵

DCFS initially opposed reversal of the order terminating parental rights, but changed its position, based on the postjudgment events at the September 3, 2008 hearing. DCFS no longer opposes reversal of the order terminating parental rights. DCFS maintains, however, that the juvenile court correctly found, at the April 25, 2008 hearing, that the sibling exception to termination of parental rights accorded by section 366.26, subdivision (c)(1)(B)(v) did not apply, and that the September 3, 2008 proceedings did not impact that finding.

⁵ A.A. and A.C. initially argued that the juvenile court abdicated its legal responsibilities by delegating to DCFS and to M.F.'s legal guardian, at the April 25, 2008 hearing, the discretion to suspend sibling visitation prior to the finalization of M.F.'s adoption. This argument was rendered moot, however, by the juvenile court's subsequent order on September 3, 2008, reinstating sibling visitation.

M.F. contends the order terminating parental rights should be affirmed. M.F. further contends the juvenile court acted in excess of its authority by modifying the permanent plan from adoption to legal guardianship and by ordering sibling visitation.

DISCUSSION

I. Applicable Law and Standard of Review

Once a juvenile court finds by clear and convincing evidence that a child is likely to be adopted, it must terminate parental rights unless an expressly enumerated statutory exception applies. (§ 366.26, subd. (c)(1)(B)(i)-(vi).) The exception at issue here provides that the court may refrain from terminating parental rights if termination would substantially interfere with a sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).) The party opposing termination has the burden of proving that the exception applies. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953.)

We review the juvenile court's ruling on whether an exception applies to termination of parental rights pursuant to section 366.26 for substantial evidence. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) Under this standard, an appellate court must affirm the juvenile court's order if there is evidence that is reasonable, credible, and of solid value to support the order. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) The evidence must be considered "in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference, and resolving all conflicts in support of the order. [Citation.]" (*In re Autumn H., supra*, at p. 576.)

Under section 366.26, subdivision (c)(1)(B)(v), the juvenile court is directed first to determine whether terminating parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship, "including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).) "If the court determines terminating parental

rights would substantially interfere with the sibling relationship, the court is then directed to weigh the child's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption. [Citation.]" (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 952.)

To show a substantial interference with a sibling relationship, the person opposing the termination of parental rights "must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child. Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship." (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 952, fn. omitted.) To determine the significance of the sibling relationship, the juvenile court considers the factors set forth in section 366.26, subdivision (c)(1)(B)(v). (*Ibid.*)

II. Postjudgment Evidence

Appellants contend the juvenile court's findings and orders from the September 3, 2008 hearing show that M.F. is no longer adoptable and that reversal of the order terminating parental rights is necessary in order to prevent M.F. from being a legal orphan. Using such postjudgment evidence as the basis for reversing the juvenile court's order terminating parental rights has been expressly prohibited by the California Supreme Court in circumstances that are factually indistinguishable from the instant case. In *In re Zeth S.* (2003) 31 Cal.4th 396 (*Zeth S.*), the Supreme Court held that it was improper for the Court of Appeal to rely on postjudgment evidence, in the form of an unsworn statement by the minor's appellate counsel, that the prospective adoptive parent may have felt pressured into choosing adoption over legal guardianship, as the basis for reversing the trial court's judgment terminating parental rights. (*Id.* at pp. 407, 413.) The court observed that it was "particularly noteworthy" that until submission of the postjudgment evidence, no party to the appeal had ever questioned or challenged the finding, made at the termination hearing below, that the minor was adoptable. (*Id.* at p. 406.) The Supreme Court then stated: "[C]onsideration of postjudgment evidence of

changed circumstances in an appeal of an order terminating parental rights, and the liberal use of such evidence to reverse juvenile court judgments and remand cases for new hearings, would violate both the generally applicable rules of appellate procedure, and the express provisions of section 366.26 which strictly circumscribe the timing and scope of review of termination orders” (*Id.* at p. 413.)

In a footnote to its opinion in *Zeth S.*, the Supreme Court acknowledged “one past occasion” in which it had addressed “whether any particular circumstances may give rise to an exception to the general rule that postjudgment evidence is inadmissible in a juvenile dependency appeal from an order terminating parental rights.” (*Zeth S.*, *supra*, 31 Cal.4th at p. 414, fn. 11.) The court explained that in *In re Elise K.* (1982) 33 Cal.3d 138, all of the parties were in agreement, and offered to stipulate, that due to changed circumstances and the minor’s advanced age, the minor in that case was no longer adoptable, and that it was appropriate to accept the parties’ stipulation as the basis for reversing the order terminating parental rights. (*Zeth S.*, at p. 414.) The court further explained: “*Elise K.* therefore serves as precedent for the proposition that where postjudgment evidence stands to completely undermine the legal underpinnings of the juvenile court’s judgment under review, and all parties recognize as much and express a willingness to stipulate to reversal of the juvenile court’s judgment, an appellate court acts within its discretion in accepting such a stipulation and reversing the judgment. Beyond that scenario, however, the nature and scope of any exception to the general rule of nonadmissibility of postjudgment evidence in an appeal by a parent or parents from an order terminating parental rights must await a case in which the facts squarely present the issue.” (*Ibid.*)

Appellants contend this case fits within the narrow exception recognized by the Supreme Court in *Zeth S.*, and that the postjudgment evidence presented here “completely undermine[s] the legal underpinnings” of the order terminating parental rights. (*Zeth S.*, *supra*, 31 Cal.4th at p. 414.) We disagree. “‘The issue of adoptability . . . focuses on the minor, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]’ [Citation.] All that is

required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. [Citation.]” (*Id.* at p. 406.) Here, as in *Zeth S.*, appellants never contested the juvenile court’s finding that M.F. was adoptable within the meaning of section 366.26, subdivision (c)(1). There is no evidence of any material change in M.F.’s age or physical or emotional condition since the April 25, 2008 hearing. M.F.’s legal guardian has stated her willingness to adopt him, and has simply acknowledged that the shortfall in assistance payments will make the adoption “very challenging.” Significantly, M.F. himself opposes reversal of the order terminating parental rights. There is also a remedy available to M.F. if the adoption does not proceed within a reasonable time -- he can file a petition to reinstate parental rights under section 366.26, subdivision (i)(2)⁶ and thereby avoid becoming a legal orphan. The proscription against using postjudgment evidence to reverse an order terminating parental rights applies to the circumstances of this case. (*Zeth S.*, *supra*, at p. 413.) The findings and orders of the juvenile court at the September 3, 2008 hearing are not a basis for reversing the order terminating parental rights.

III. Substantial Evidence Supports the Juvenile Court’s Determination Concerning Sibling Relationships

Substantial evidence supports the juvenile court’s determination that a significant sibling relationship did not exist between M.F. and his siblings. M.F. and his siblings were, for the most part, not raised together in the same home. They lived together for 15 months, from the time of M.F.’s birth until his first section 342 petition was filed in October 2003. M.F. then lived in a foster home separate from his siblings for six months, until the juvenile court returned all four children to mother’s care in April 2004. Thereafter, M.F. again lived with his siblings for six months, until he suffered injuries inflicted by mother in October 2004 that required his hospitalization and emergency brain

⁶ Section 366.26, subdivision (i)(2) provides in part: “A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388.”

surgery. He has lived apart from his siblings since then. The record thus shows that M.F. lived with his siblings for 21 months, most of which were in the very early part of his life, and some of which were interrupted by separate foster care placements. At the time of the section 366.26 hearing, M.F. was nearly six years old and had spent the past three and a half years continuously living apart from the other children.

Appellants did not show that M.F. shared significant common experiences with his siblings. Instead, the record shows that mother's abuse affected M.F. and his siblings in profoundly different ways, permanently altering their subsequent life experiences. Of the four children, only M.F. suffered the type of severe physical abuse that required emergency surgery to save his life and subsequent surgeries to repair damage to his skull and developing muscles. Notwithstanding the surgical interventions and extensive physical therapy, M.F. suffers from permanent disabilities. He must wear orthopedic braces and sleep in a safety crib, and requires substantial medical and health services. In contrast, M.F.'s siblings attend regular schools, are able to participate in school activities, and enjoy sports. The difference in physical injuries is not the only thing that separates M.F.'s experience from that of his siblings. Although M.F. sustained grievous physical injuries, he did not suffer the kind of emotional trauma his older siblings sustained as the result of abuse and then separation from mother and father. Thus, while all three siblings have received individual psychotherapy services, M.F. has not.

Appellants also did not establish the existence of a close and strong bond between M.F. and his siblings. While the record shows that all of the children, including M.F., enjoyed the sibling visits, their interaction during these visits was more like that of friends rather than siblings. At the end of the visits, M.F. allowed the other children to hug him, and then turned to go. He did not cry or appear to be upset when the visits were ending, and returned willingly to his foster mother. Substantial evidence thus supports the juvenile court's finding that M.F.'s relationship with his siblings was not sufficiently significant to cause detriment on termination. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 952.)

IV. Appellants' Claimed Prejudice As the Result of Infrequent Visitation

Appellants maintain that their ability to establish the sibling exception under section 366.26, subdivision (c)(1)(B)(v) was prejudiced as the result of irregular and infrequent visitation between M.F. and his brothers. They contend that despite consistent complaints by counsel for A.C. and A.A., DCFS failed to ensure that court ordered sibling visitation occurred after August 2007, and that the absence of regular visitation caused the attenuation of an otherwise strong sibling bond.

The record shows that over the nearly three year history of the case, sibling visits occurred fairly regularly. During M.F.'s hospitalization, the siblings made one hospital visit. After M.F. was discharged from the hospital, DCFS facilitated M.F.'s participation in weekly sibling visits at a Carl's Jr. restaurant. By July 2005, a visitation plan had been developed and sibling visits occurred every other week. Thereafter, sibling visits occurred regularly through late January 2007.

Counsel for A.C. and A.A. first raised the issue of infrequent sibling visits at a hearing in May 2007. In response, the juvenile court ordered sibling visits at least every three weeks, and gave DCFS the discretion to liberalize the frequency of those visits. There were no further complaints about the frequency of sibling visits until early December 2007, when counsel for A.C. and A.A. again complained that visits between M.F. and his siblings were not occurring as regularly as the court had ordered. The juvenile court ordered DCFS to facilitate the sibling visits, including an after-court visit that day. No visits occurred in late December 2007 and early January 2008 because M.F.'s foster parent was not in California at that time. DCFS thereafter arranged for two sibling visits in February 2008.

Although no sibling visits appear to have occurred for several weeks before the section 366.26 hearing, the record as a whole shows that there were relatively few periods during which visits between M.F. and his siblings did not regularly occur. The record thus does not support appellants' allegation that infrequent sibling visits prejudiced them in their ability to establish the exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(v).

V. Benefits of Adoption Versus Benefits of Maintaining the Sibling Relationship

Substantial evidence supports the juvenile court's determination that the benefits of adoption outweigh the benefits to M.F. of maintaining a relationship with his siblings. As discussed, M.F.'s brain injury left him developmentally disabled and reliant on extensive medical care. M.F.'s guardian and prospective adoptive mother has provided him with such care in a stable and loving home for three years and has expressed a willingness and desire to continue to do so into his adulthood. The benefits of permanency with the legal guardian outweigh any benefit to M.F. in maintaining a relationship with his siblings. Substantial evidence supports the juvenile court's determination that terminating parental rights would not substantially interfere with a sibling relationship.

VI. Alleged Evidentiary Error

Appellants contend the juvenile court erred by excluding testimony by A.C. and A.A. about their feelings toward M.F. and his proposed adoption. They maintain that such testimony was relevant to establishing the nature of M.F.'s relationship with his brothers and the significance of the sibling bond. The juvenile court did abuse its discretion by excluding such evidence.

“[T]he sibling relationship exception permits the trial court to consider possible detriment to the child being considered for adoption, but not a sibling of that child.” (*In re Celine R.* (2003) 31 Cal.4th 45, 54.) While it is true that evidence of a sibling's relationship with the child and the sibling's views of that relationship might be relevant as indirect evidence of the effect the adoption may have on the adoptive child, “the ultimate question is whether adoption would be detrimental to the adoptive child, not someone else.” (*Id.* at p. 55.) Excluding testimony from M.F.'s siblings about their feelings toward him and his adoption was not an abuse of discretion.

Substantial evidence supports the juvenile court's determination that terminating parental rights would not substantially interfere with a sibling relationship.

VII. M.F.'s Arguments Regarding Permanency Plan Changes and Post-termination Sibling Visitation

In response to our request for supplemental briefing regarding the effect of the September 3, 2008 proceedings on the issues presented in this appeal, M.F. submitted a brief in which he contends the juvenile court acted in excess of its authority by reinstating parental rights at the September 3, 2008 hearing, in violation of section 366.26, subdivision (i)(1).⁷ The juvenile court did not reinstate parental rights at the September 3, 2008 hearing, nor did the juvenile court set aside, change, or modify its previous order terminating parental rights. M.F. further contends the juvenile court did not have the power to modify the permanent plan from adoption to legal guardianship at the September 3, 2008 hearing, and that the court's findings and orders of that date, including the order directing sibling visitation, are void or voidable. The propriety of the orders changing M.F.'s permanent plan from adoption to legal guardianship, and directing sibling visitation are not subjects of this appeal, and we have no jurisdiction to review them. (See *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316-1317 [failure to file notice of appeal from juvenile court order deprives appellate court of jurisdiction to modify that order].)⁸

⁷ Section 366.26, subdivision (i)(1) provides: "Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order."

⁸ No notice of appeal appears to have been filed with respect to the juvenile court's September 3, 2008 findings and orders.

DISPOSITION

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST